Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

CHEMICAL & ALLIED PRODUCT WORKERS' UNION, LOCAL 20, a/w INTERNATIONAL UNION OF ALLIED NOVELTY AND PRODUCTION WORKERS, AFL-CIO,

Petitioner,

versus

JAYS FOODS, L.L.C.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED.

I. WAS IT ERROR FOR THE COURT OF APPEALS TO DECLARE A NEW CATEGORY OF INTERLOCUTORY ORDERS APPEALABLE AS A MATTER OF RIGHT, WHEN SUCH POWER LIES ONLY WITH THIS COURT OR CONGRESS?

II. WAS IT ERROR TO FIND THAT AN ORDER OF THE DISTRICT COURT WHICH VACATED AN ARBITRAL AWARD AND REMANDED THE MATTER TO THE ARBITRATOR CONSTITUTED AN INTERLOCUTORY ORDER, WHEN THE OTHER THREE APPELLATE COURTS THAT HAVE CONSIDERED THE QUESTION HAVE RULED THAT SUCH ORDERS ARE FINAL?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit in *Jays Foods, LLC v. Chemical & Allied Products Union, Local 20, etc.*, 208 F.3d 610 (7th Cir. 2000) is set forth in the appendix hereto (App. 1a), as is the decision by the same court in a prior appeal in this matter, at App. 10a.

The orders of the United States District Court for the Northern District of Illinois are unreported and set forth in the Appendix at App. 8a and 12a.

BASIS FOR JURISDICTION

The final judgment of the United States Court of Appeals for the Seventh Circuit affirming the decision of the United States District Court for the Northern District of Illinois was entered on March 31, 2000. The petitioner's timely petition for rehearing en banc was denied on April 28, 2000 (App. at 7a). This petition for writ of certiorari is filed within ninety (90) days of that date. 28 U.S.C. Section 2101(c).

The jurisdiction of the Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUORY PROVISIONS INVOLVED

9 U.S.C. Section 16. Appeals

(a) An appeal may be taken from –

(1) an order –

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order –

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

28 U.S.C. Section 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

28 U.S.C. Section 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. Section 1292. Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing,

modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction –

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction

of an appeal under section 1295 of this title; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d) (1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(2) When the chief judge of the United States Court of Federal Claims issues an order under section 798(b) of this title, or when any judge of the United States Court of Federal Claims, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from

such order, if application is made to that Court within ten days after the entry of such order.

(3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Court of Federal Claims, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Court of Federal Claims or by the United States Court of Appeals for the Federal Circuit or a judge of that court.

(4)(A) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from an interlocutory order of a district court of the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, granting or denying, in whole or in part, a motion to transfer an action to the United States Court of Federal Claims under section 1631 of this title.

(B) When a motion to transfer an action to the Court of Federal Claims is filed in a district court, no further proceedings shall be taken in the district court until 60 days after the court has ruled upon the motion. If an appeal is taken from the district court's grant or denial of the motion, proceedings shall be further stayed until the appeal has been decided by the Court of Appeals for the Federal Circuit. The stay of proceedings in the district court shall not bar the granting of preliminary or injunctive relief, where appropriate and where expedition is reasonably necessary. However, during the

period in which proceedings are stayed as provided in this subparagraph, no transfer to the Court of Federal Claims pursuant to the motion shall be carried out.

(e) The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).

STATEMENT OF THE CASE.

This case involves a union's vain attempt to maneuver through a legal labyrinth in an effort to enforce its rights under its collective bargaining agreement with an employer. Contrary to the collective bargaining agreement, Jays Foods LLC ("Jays") initiated a third shift operation without first notifying or discussing it with Chemical & Allied Product Workers Union, Local 20 ("Local 20"). Local 20 pursued a grievance through final and binding arbitration as provided for under the collective bargaining agreement. The arbitrator ruled in Local 20's favor, and ordered Jays to negotiate with Local 20 before implementing the third shift, and to pay back pay to all employees affected by Jay's improper conduct.

Jays refused to comply with the backpay portion of arbitration award, and instead filed a petition in the United States District Court for the Northern District of Illinois pursuant to Section 301 of the *Labor Management Relations Act*, 29 U.S.C. Section 185, seeking to vacate the arbitrator's award. Local 20 filed a counterclaim seeking to enforce the award.

On May 11, 1998, the district court entered an order granting Jays' motion for judgment on the pleadings and vacating the award while denying Local 20's motion for judgment on the pleadings to enforce the award; and remanding the matter to the arbitrator for further proceedings consistent with the district court's opinion (App. at 12a). On remand, the arbitrator reiterated his opinion that the grievance should be decided for Local 20, but he denied the grievance solely on his view that the district court's directive compelled him to do so. This second award was entered of record in the district court by agreement of the parties. Following

the entry of the second award, Local 20 filed an appeal from the vacature on the theory that the second award rendered the court's order final for purposes of an appeal under the extant case law within the circuit, which held that a vacature order coupled with a remand order was not final for purposes of appeal (App. at 1a).

The appeals court rejected Local 20's finality argument without analysis and dismissed the appeal as premature, holding that the order was not final due to the fact that the remand order was not ministerial in nature, and directing the parties to "proceed back through the federal courts to confirm or vacate the second award" (App. at 11a).

Local 20 then filed a motion for a Rule 54 judgment on both arbitration awards in the original proceeding. The district court denied the motion, finding that its May 11, 1998 order vacating the first award was final, therefore its jurisdiction had terminated; and that the union should have filed an independent action to vacate the second award in view of the appellate court order dismissing the initial appeal (App. at 9a).

The Seventh Circuit affirmed. First, it abandoned its prior holdings, including the first appeal in the case, and now held that a vacature order coupled with a remand directive was, indeed, appealable, but noted that Local 20 had not filed an appeal within thirty (30) days of the initial order, thus the appellate court's prior holdings were "harmless error." It next held that orders of this type nevertheless remained interlocutory in nature and could be appealed either immediately upon entry, or after an action is brought in a second court to test the validity of the second award. If the latter, the non-prevailing party in the second district court would, when appealing that order, could include the propriety of the vacature order in the first proceeding.

REASONS FOR GRANTING THE WRIT.

I. THE COURT OF APPEALS EXCEEDED ITS STATUTORY AUTHORITY BY DECLARING A CATEGORY OF INTERLOCUTORY ORDERS APPEALABLE AS A MATTER OF RIGHT.

Federal courts are creatures of the legislature, with their jurisdiction limited to specified categories and cases. Indeed, the entire expanse of power set out for the judiciary in the Constitution has never been vested in the lower courts by the legislature. *Palmore v. U.S.*, 411 U.S. 389, 400-01 (1973).

A court of appeals' jurisdiction consists principally of review of final orders (29 U.S.C. Section 1291) and interlocutory orders involving non-temporary injunctions as well as questions certified by the district court to which the reviewing court agrees (29 U.S.C. Section 1292). Congress also has authorized interlocutory appeals in other discrete instances[1] and has authorized this Court to permit interlocutory appeals not otherwise covered by statute under the *Federal Courts Administration Act of 1992*, 28 U.S.C. Section 1292(e).

Here, the court of appeals has exceeded its statutory jurisdiction by arrogating to itself the authority to create a new category of case for which interlocutory appeals may be taken without regard to the provisions of 28 U.S.C. Section 1292. A court of appeals cannot usurp this Court's authority to expand interlocutory appeals, as it has no jurisdiction to consider non-final orders except as the statutes so provide. *U.S. v. Mississippi Power & Light*, 638 F.2d 899, 902 and n.2 (5th Cir. 1981); *cert*

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[1] *See, e.g. Uniform Arbitration Act*, 9 U.S.C. Section 16; *All Writs Act*, 28 U.S. Section 1651.

den. 454 U.S. 892, *rev'd on other grounds,* 723 F.2d 422 (5th Cir. 1984), *reh. den.* 734 F.2d 226.

Furthermore, the approach of the court below would result in inequities. If Local 20 had filed an action to vacate the second award and prevailed, it would have been barred from appealing from that judgment in order to seek review of the vacature award in the first proceeding because a party may only appeal from an adverse order. *See, e.g., Knight v. Alabama,* 14 F.3d 1534, 1555-56 (11th Cir. 1994).

II. THE COURT OF APPEALS ERRED IN HOLDING THAT AN ORDER OF THE DISTRICT COURT VACATING AN ARBITRAL AWARD AND REMANDING THE MATTER FOR FURTHER PROCEEDINGS IS INTERLOCUTORY IN NATURE, AS THIS VIEW CONFLICTS WITH THE THREE OTHER COURTS OF APPEAL THAT HAVE CONSIDERED THE MATTER.

The appellate court's declaration that a district court order which vacates an arbitral award and remands the dispute to an arbitrator is an interlocutory order conflicts with the three other courts of appeal who have considered the matter. *Virgin Island Housing Authority v. Coastal General Construction*, 27 F.3d 911, 914 (3rd Cir. 1994); *Union Pac. R. Co. v. United Transportation Union*, 3 F.3d 255, 258 (8th Cir. 1993), *cert. den.* 510 U.S. 1072; *Forsythe Intern., S.A. v. Gibbs Oil Co.*, 915 F.2d 1017, 1020 (5th Cir. 1990). The rationale for these courts holding that such an order is final is that otherwise the vacature order would be unreviewable. The court below avoided this problem by declaring that the order vacating the first award is reviewable on appeal in a subsequent district court proceeding.

If the order in the first proceeding is final, hence appealable, its propriety cannot be questioned in an appeal following an independent action regarding the second arbitration award without offending res judicata principles. *American Surety Co. v. Baldwin*, 287 U.S. 156, 166-67. Moreover, even if the first order were regarded as interlocutory, it would nevertheless be unreviewable following a proceeding involving the second arbitration award.

None of the cases relied upon by the appeals court to support its assertion that a second district court can review the vacature order of the first court involve two separate proceedings except perhaps *LeBlang Motors, Ltd., v. Subaru of America, Inc.*, 148

F.3d 680, 689 (7th Cir. 1998), in which the first court conditioned the voluntary dismissal of the plaintiff's complaint upon its orders being applicable in any subsequent re-filing. These facts suggest that only one proceeding existed de facto. There is no basis for permitting review of the vacature order of the first court after a second proceeding.

CONCLUSION.

Local 20 is entitled to a review of the district court decision improperly vacating the arbitrator's original award. Although Local 20 followed what was then valid Seventh Circuit law to perfect an appeal, the court of appeals nonetheless ruled that the district court's decision was not final, and hence not reviewable. The court below recognized its error in its second decision, and that its imprecise order created additional confusion. Rather than sanctioning Local 20's good faith attempt to follow its vague instructions, the court created new and equally erroneous procedures for appeals in these cases, and penalized Local 20 for not correctly forecasting what it had in mind.

For these reasons, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Seventh Circuit and, ultimately, to reverse the decision below and remand to the district court with directions to enter a final order respecting both arbitration awards.

Respectfully submitted

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No. 99-2807

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Jays Foods, L.L.C.,
Plaintiff-Appellee

v.

Chemical & Allied Product Workers Union, Local 20,
AFL-CIO,
Defendant-Appellant.

January 21, 2000, Argued

March 31, 2000, Decided

COUNSEL:

For JAYS FOODS, L.L.C., Plaintiff - Appellee: John S. Schauer, Thomas Piskorski, SEYFARTH, SHAW, FAIRWEATHER & GERALDSON, Chicago, IL USA.

For CHEMICAL & ALLIED PRODUCT WORKERS UNION, LOCAL 20, AFL-CIO, Defendant - Appellant: David Matthews, CARMELL, CHARONE, WIDMER, MATHEWS & MOSS, Chicago, IL USA.

JUDGES:

Before: Posner, Chief Judge, and Flaum and Diane P. Wood, Circuit Judges.

OPINION:

Posner, Chief Judge. We write to untie a procedural knot partly of our own tying. Jays Food and a local of

the chemical workers union have a collective bargaining agreement that provides for arbitration of disputes arising under it. In 1997 an arbitrator determined that Jays had violated the agreement by starting a third shift in a manner that reduced the paid hours of work of employees on the first and second shifts. Jays filed suit in federal district court to vacate the arbitrator's decision, and the union counterclaimed to confirm it. 9 U.S.C. Section 9; 29 U.S.C. Section 185. The district court ruled that the arbitrator had exceeded his authority under the collective bargaining agreement, and remanded the matter to the arbitrator "for further determination," adding that by doing this the court was "terminating case." After the arbitrator rendered his decision on remand, this time in favor of Jays, the union appealed from the order of remand. We dismissed the appeal in an unpublished order, on the ground that an order by a district court remanding a case to an arbitrator is not a final, appealable decision within the meaning of 28 U.S.C. Section 1291 unless the remand requires a merely ministerial act, such as calculating interest when the period for which the calculation must be made, the interest rate, the principal to which the rate is to be applied, and whether interest is simple or compound have all been determined. *Shearson Loeb Rhoades, Inc. v. Much*, 754 F.2d 773, 776-78 (7th Cir. 1985); *United Steelworkers v. Aurora Equipment Co.*, 830 F.2d 753, 754 (7th Cir. 1987). We had pointed out in these cases that if more is required, allowing an appeal would delay the ultimate resolution of the parties' dispute. More was required here. The arbitrator had written an opinion that did not satisfy the district judge, but the judge sent it back to him to make a new award rather than telling him to rule in favor of Jays.

It is true that by saying "terminating case" the district court might have been thought to be issuing

a final judgment; but all he might have meant was that he was terminating the immediate proceeding before him, that is, the motion to vacate the arbitrator's award and the countermotion to confirm it. And whatever he meant, that may be all he did. For as we said in *Chrysler Motors Corp. v. International Union, Allied Industrial Workers of America*, 909 F.2d 248, 249 (7th Cir. 1990) (emphasis added), "The ground of the motion to dismiss the employer's appeal is that the order confirming the arbitrator's award is not final, since the matter of back pay remains to be determined by him. It is final in the district court, but under our cases that may not be good enough. Provided that the matter left for determination is not merely ministerial, . . . an order that does not determine the entire substantive relief to which the plaintiff is entitled is not a final decision even if the loose ends remain to be tied up by a decision-maker other than the district judge."

But we were wrong, not in general but with reference to the appealability of orders remanding cases to arbitrators, in thinking that the district court's order of remand was not immediately appealable. Congress had in 1988 amended the Federal Arbitration Act to make orders vacating arbitral awards appealable immediately, though nonfinal, 9 U.S.C. Section 16(a)(1)(E); *Perlman v. Swiss Bank Corp. Comprehensive Disability Protection Plan*, 195 F.3d 975, 979-80 (7th Cir. 1999), unless the purpose of the remand was merely to enable the arbitrator to clarify his decision in order to set the stage for informed appellate review. *Virgin Islands Housing Authority v. Coastal General Construction Services Corp.*, 27 F.3d 911, 913-14 (3d Cir. 1994). That was not the purpose here. Our error was harmless, however, because the appeal was in any event untimely. The district court had issued its order of remand on May 11, 1998, and the union did

not file its notice of appeal until August 19, which was more than 30 days later.

We ended our order dismissing the union's appeal by saying that "the parties must proceed back through the federal courts to confirm or vacate the second award." This Delphic utterance left unexplained both how the union could challenge the district court's first decision, the decision vacating the arbitrator's award, which had been in the union's favor, and why the parties would have to file a brand-new suit (if that's what "proceed back" meant) in the district court. Let's take the second question first. There is no hard-and-fast rule, except in the Ninth Circuit, *Shapiro v. Paradise Valley Unified School Dist. No. 69*, 152 F.3d 1159 (9th Cir. 1998) (per curiam), and, by virtue of statute, in the social security area, 42 U.S.C. Section 405(g); *Shalala v. Schaefer*, 509 U.S. 292, 125 L. Ed. 2d 239, 113 S. Ct. 2625 (1993); *Richmond v. Chater*, 94 F.3d 263, 266-70 (7th Cir. 1996); *Raitport v. Callahan*, 183 F.3d 101 (2d Cir. 1999) (per curiam); *cf. Perlman v. Swiss Bank Corp. Comprehensive Disability Protection Plan*, *supra*, 195 F.3d at 979-80, and perhaps other specialized areas with which we are not familiar, about when a remanding court loses jurisdiction over the case, thus necessitating a fresh proceeding of some sort after the remand to bring the issue back to that court. The presumption, however, is in favor of relinquishment. For when a court makes a limited remand unlikely to resolve the case but intended rather to assist the court in making its decision (a typical example being a remand to enable the district court to decide whether to enter a Rule 54(b) order to enable us to exercise appellate jurisdiction), the court will either state that it is retaining jurisdiction, *e.g.*, *Boyko v. Anderson*, 185 F.3d 672 (7th Cir. 1999); *Alexander v. Chicago Park District*, 773 F.2d 850, 857 (7th Cir. 1985); *United States v. Doe*, 63 F.3d 121, 131 (2d Cir. 1995); *Caterpillar, Inc. v.*

N.L.R.B., 138 F.3d 1105, 1107-08 (7th Cir. 1998) (chambers opinion), and cases cited there, or dismiss with leave to reinstate, which we treat as the equivalent of a stay. *Baltimore & Ohio Chicago Terminal R.R. v. Wisconsin Central Limited*, 154 F.3d 404, 408 (7th Cir. 1998). The presumption was reinforced here by the district court's statement that it was "terminating case," suggesting that it was indeed relinquishing jurisdiction. No doubt the judge hoped that on remand the arbitrator would render an award that satisfied both parties or, more likely, would be solid enough to discourage a judicial challenge.

On remand, the arbitrator grudgingly ruled in favor of Jays, emphasizing that he disagreed with the district court's decision but was bowing to what he thought its implicit command to rule for the company. Naturally at this point the union wanted to get appellate review of the district court's initial decision, the decision vacating the arbitral award in the union's favor. It could have gotten this by filing a proceeding in the district court to set aside the second arbitral award on the ground that the court had erred in setting aside the first one. If the court was not persuaded and ruled in favor of Jays, the union could appeal to us and the appeal would bring up for review all nonmoot interlocutory orders issued by the district court, *Lauer v. Apfel*, 169 F.3d 489, 492 (7th Cir. 1999); *LeBlang Motors, Ltd. v. Subaru of America, Inc.*, 148 F.3d 680, 689 (7th Cir. 1998); *Librizzi v. Children's Memorial Medical Center*, 134 F.3d 1302, 1305-06 (7th Cir. 1998); *Keefe v. Prudential Property & Casualty Ins. Co.*, 203 F.3d 218, 226 (3d Cir. 2000), including the order vacating the first arbitral award.

Granted, this is a slightly tricky point, since in our hypothetical example of the union's filing a fresh proceeding to set aside the award made by the arbitrator on remand we described as "interlocutory"

an order technically issued in a prior case. But the usage is correct. When a case is appealed (here to the district court from the arbitrator rather than from the district court to this court) following a remand, there are two appellate proceedings but only one underlying litigation, and any interlocutory order in that litigation, even if it preceded the first appeal, is (within the limits of the doctrine of law of the case) open to review on the second appeal, unless it has become moot in the interim. *Shearson Loeb Rhoades, Inc. v. Much, supra; cf. Reilly v. Waukesha County*, 993 F.2d 1284, 1286-87 (7th Cir. 1993). The fact that an interlocutory order is appealable doesn't require that it be appealed, on pain of forfeiture if it is not. That would only encourage piecemeal litigation. A party can wait until the litigation is over and then bring a single appeal from the final judgment and challenge all nonmoot interlocutory orders, appealable or not, rendered along the way. *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 608 (7th Cir. 1993); *Chambers v. Ohio Dept. of Human Services*, 145 F.3d 793, 796 (6th Cir. 1998); *Ernst v. Child & Youth Services*, 108 F.3d 486, 492-93 (3d Cir. 1997); *Sierra Club v. Robertson*, 28 F.3d 753, 756 n. 3 (11th Cir. 1994).

Instead of taking up our invitation to file a new suit to challenge the second arbitral award, the union inexplicably moved the court in the original suit, the suit the district court had dismissed when it remanded the case to the arbitrator--a suit that consequently did not exist when the union filed its motion--to enter a "Rule 54" order. It is from the denial of that motion that the union appeals. The reference in the motion to "Rule 54" was presumably to Rule 54(b) of the Federal Rules of Civil Procedure, which permits a district court in certain circumstances to issue a final, and thus immediately appealable, judgment even though some piece of the case remains pending in the district court. *E.g.*,

Continental Casualty Co. v. Anderson Excavating & Wrecking Co., 189 F.3d 512, 516-18 (7th Cir. 1999). The union must have thought it couldn't appeal the district court's order vacating the initial arbitral award without getting the court to make that order a Rule 54(b) judgment, because the order was interlocutory (and thus unappealable unless made a Rule 54(b) judgment); it must have thought the case was continuing in the district court awaiting a motion to vacate or confirm the second award. This was doubly wrong. The order vacating the arbitrator's first award, though indeed interlocutory, could, as we have emphasized, be appealed at the end of the entire litigation. And there was no pending proceeding in the district court, which had relinquished jurisdiction over the controversy when it sent the case back to the arbitrator. It is not surprising, therefore, that the district court's response to the Rule 54(b) motion was to deny it, on the ground that there was no case before the court. The motion was frivolous, and in no wise invited by our previous order. What is inexplicable, therefore, is why the union did not file a fresh challenge to the arbitrator's second award, which if confirmed by the district court could have been brought up to us for review by an appeal from that confirmation.

The denial of the union's motion for the entry of a Rule 54(b) judgment was correct, and is therefore Affirmed.

No. 99-2807

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JAYS FOODS, L.L.C.,
Plaintiff-Appellee,

v.

CHEMICAL & ALLIED PRODUCT WORKERS UNION,
LOCAL 20, AFL-CIO,
Defendant-Appellant.

April 28, 2000, Decided

PRIOR HISTORY:

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 97 C 6227. Wayne R. Andersen, Judge.

JUDGES:

Before Hon. Richard A. Posner, Chief Circuit Judge, Hon. Joel M. Flaum, Circuit Judge, Hon. Diane P. Wood, Circuit Judge.

OPINION: ORDER

On April 14, 2000, defendant-appellant filed a petition for rehearing and petition for rehearing *en banc*. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing *en banc*. The petition is therefore **DENIED**.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number: 1:97-cv-06227

Title: Jays Foods LLC v. Chemical & Allied Un

Assigned Judge: Honorable Wayne R. Andersen

MINUTE ORDER of 6/25/99 by Hon. Wayne R. Andersen : We deny the motion the Union for the entry of a Rule 54 judgment [28-1]. It so ordered. (See reverse of minute order.) Mailed notice

This docket entry was made by the clerk on June 28, 1999.

ORDER

This case is before the court on the motion of defendant, Chemical & Allied Product Workers Union Local #20 ("Union") for the entry of a Rule 54 judgment. For the reasons stated below, we deny the motion.

This dispute originated when the Union, who represents plaintiff Jay Foods ("Jays") employees, claimed that Jays violated the collective bargaining agreement because it implemented a new third shift at its plant. An arbitrator sustained the Union's grievance, and Jays filed this action seeking to vacate the arbitration award.

On May 11, 1998, we vacated the arbitrator's award and ruled that the arbitrator exceeded his authority under the collective bargaining agreement. We remanded the matter to the arbitrator for further determination consistent with our Opinion. On

August 5, 1998, the arbitrator entered a second award denying the Union's grievance. On August 19, 1998, the Union appealed the May 11, 1998 order of this court vacating the first arbitration award.

On December 15, 1998, the Seventh Circuit dismissed the appeal on the grounds that the May 11, 1998 order was not final and appealable and directed the parties to "proceed back through the federal courts to confirm or vacate the second award." The Union now seeks entry of a Rule 54 judgment.

The procedure to confirm or vacate a private labor arbitration award in federal court is well established. A complaint must be filed pursuant to Section 301 of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. Section 185. *See e.g., Sullivan v. Gilchrist*, 87 F.3d 867 (7th Cir. 1996); *Sullivan v. Lemoncello*, 36 F.3d 676 (7th Cir. 1994). Otherwise, an arbitration award is not before the court.

In this case, the Seventh Circuit ordered that "the parties must proceed back through the federal courts to confirm or vacate the second award" in order to perfect a final judgment capable of appeal. Thus, if the Union desired to perfect a final judgment, it should have filed a complaint seeking to vacate the second award. However, rather than filing a complaint to vacate or confirm the second award, the Union now seeks entry of a Rule 54 judgment. In its motion, the Union does not even argue what the Rule 54 judgment should be. The Union's motion simply does not comply with the Seventh Circuit's order.

We deny the Union's motion because this court has no jurisdiction to decide the motion. There is no case properly before this court. When we vacated the first arbitration award in our May 11, 1998 opinion, we terminated jurisdiction over the

case. We fully disposed of the case and nothing remains for us to decide.

For these reasons, we deny the motion of the Union for entry of a Rule 54 judgment. It is so ordered.

S/ Wayne R. Andersen
Wayne R. Andersen
United States District Judge

Dated: June 25, 1999

United States Court of Appeals
for the Seventh Circuit
Chicago, Illinois 60604

December 15, 1998

Before

Hon. Richard A. Posner, *Chief Judge*
Hon. Joel M. Flaum, *Circuit Judge*
Hon. Diane P. Wood, *Circuit Judge*

JAYS Foods, L.L.C., Plaintiff-Appellee,	]	Appeal From the United States District Court for the Northern District of Illinois, Eastern Division.
No. 98-3109 v.	]	
CHEMICAL & ALLIED PRODUCT WORKERS UNION, LOCAL 20, AFL-CIO Defendant-Appellant.	]	No. 97 C 6227
	]	Wayne R. Andersen, Judge.

ORDER

The Union representing Jays employees claimed that Jays Foods violated the collective bargaining agreement ("CBA") when it implemented a new third shift at its plant. A labor arbitrator sustained the Union's grievance and ordered the parties to negotiate the implementation of a third shift within 45 days or cease third shift operations and pay employees adversely affected. Jays filed an

action in federal district court seeking to vacate the award; the Union counterclaimed, seeking to confirm the award. The district court ruled that the arbitrator exceeded his authority under the CBA, vacated the award and remanded "for further determination."

In *Shearson Loeb Rhoades, Inc. v. Much*, 754 F.2d 773, 776-77 (7th Cir. 1985), we held that a district court remand to an arbitrator is not a final judgment for purposes of appeal under 28 U.S.C. § 1291 if the remand requires more than ministerial action. *See also United Steelworkers v. Aurora Equipment Co.*, 830 F.2d 753, 754 (7th Cir. 1987). The district court in the case at hand remanded the matter to the arbitrator "for further determination." The remand order did not dictate a result or otherwise direct the arbitrator to perform some ministerial action; the only limitation imposed was to proceed "consistent with" the district court's opinion. We conclude such a remand left the arbitrator with choices, requiring more than ministerial action.

This appeal is DISMISSED. The parties must proceed back through the federal courts to confirm or vacate the second award.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Michael W. Dobbins
CLERK

Office of the Clerk

Case Number: 1:97-cv-06227

Title: Jays Foods LLC v. Chemical & Allied Un

Assigned Judge: Honorable Wayne R. Andersen

MINUTE ORDER of 5/11/98 by Hon. Wayne R. Andersen: Enter Memorandum, Opinion and Order: For all the foregoing reasons, we find that Arbitrator Wolff exceeded his authority by reading provisions out of the collective bargaining agreement and injecting his own notions of policy and equit [sic] into the Award. Accordingly, the Union's motion for judgment on the pleadings is denied [6-1]. Jay's motion for judgment on the pleadings is granted [8-1]. The Arbitrator's Award is vacated and this matter is remanded to the Arbitrator for further determination consistent with this opinion. It is so ordered. terminating case Mailed notice

This docket entry was made by the clerk on May 13, 1998

Supreme Court, U.S.
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(2)

No. 00-168

In The
SUPREME COURT OF THE UNITED STATES
October Term, 2000

CHEMICAL & ALLIED PRODUCT WORKERS' UNION
LOCAL 20, AFL-CIO,

Petitioner,

vs.

JAYS FOODS, L.L.C.,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, Jays Foods, L.L.C. advises the Court that it has no parent company, corporate subsidiaries, or affiliates.

PARTIES BELOW

The Plaintiff-Appellee below (and Respondent here) was Jays Foods, L.L.C. The Defendant-Appellant below (and Petitioner here) was Chemical & Allied Product Workers' Union, Local 20, a/w International Union of Allied Novelty and Production Workers, AFL-CIO.

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OPINIONS BELOW

Jays Foods, L.L.C. v. Chemical & Allied Products Union, Local 20, 208 F.3d 610 (7th Cir. 2000).

STATEMENT OF JURISDICTION

(i) The Judgment of the United States Court of Appeals for the Seventh Circuit which Petitioner seeks to have reviewed by this Court issued on March 31, 2000.

(ii) Petitioner filed a petition for rehearing and for rehearing *en banc*, which was denied by the United States Court of Appeals for the Seventh Circuit on April 28, 2000.

(iii) No cross-petitions for writ of certiorari have been filed.

(iv) The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

STATUTES INVOLVED

9 U.S.C. § 16; 28 U.S.C. § 1291; 28 U.S.C. § 1292.

STATEMENT OF THE CASE

This case has a unique history resulting from problems entirely of Petitioner's own making. In this regard, Petitioner Chemical & Allied Product Workers' Union, Local 20 a/w International Union of Allied Novelty and Production Workers, AFL-CIO ("Union"), has omitted significant facts from its statement of the case.

On September 3, 1997, Respondent Jays Foods, L.L.C. ("Jays" or "Company") filed a complaint in the United States District Court for the Northern District of Illinois to vacate a labor arbitration award. Jays then moved for judgment on the pleadings under Fed.R.Civ.P. 12(c). The Union filed a counterclaim and motion to confirm the award. (Appendix to Petition at 2a).

In an Order and Opinion dated May 11, 1998, the District Court granted Jays' motion, denied the Union's motion, and vacated the arbitration award. (*Id.* at 2a, 9a-11a, 14a). The District Court remanded the matter to the arbitrator "for further determination consistent with [the District Court's] opinion," and "terminat[ed the] case." (*Id.* at 2a-3a, 14a). The Union did not file a timely notice of appeal with respect to the May 11, 1998 Order and Opinion.

On remand, the arbitrator issued a second award denying

the Union's grievance. (*Id.* at 2a). On August 19, 1998, ***more than three months*** after the District Court's remand Order issued (and well after expiration of Fed.R.App.P. 4's 30-day period for filing a notice of appeal), the Union filed a notice of appeal to the United States Court of Appeals for the Seventh Circuit. (*Id.* at 3a-4a). On December 15, 1998, the Seventh Circuit dismissed the Union's appeal, and ordered that "[t]he parties must proceed back through the federal courts to confirm or vacate the second [arbitration] award[.]" (*Id.* at 12a-13a).

The Union did *not* file a petition for writ of certiorari with this Court seeking review of the Seventh Circuit's December 15, 1998 dismissal. Nor did the Union follow the proper procedure for vacating an arbitration award – a complaint in the District Court – with respect to the second award. Indeed, the Seventh Circuit explicitly directed the Union to follow this procedure in order to challenge the second award. (*Id.* at 6a-7a, 12a-13a). Inexplicably, the Union ignored the Seventh Circuit's directive, and instead filed a motion for a "Rule 54" order of judgment in the District Court – a wholly inapposite procedural mechanism. (*Id.* at 6a-7a). But there was no pending proceeding in the District Court, which had relinquished jurisdiction over the controversy when it sent the case back to the arbitrator. Not surprisingly, therefore, the District Court denied the Union's motion on the ground that there was no case before it. (*Id.* at 7a). The Union thereafter appealed, and the Seventh Circuit affirmed. It is this decision, flowing directly from its disregard of the

Seventh Circuit's instructions, for which the Union seeks this Court's review.

REASONS FOR DENYING THE WRIT

I.

REVIEW OF QUESTION I IS INAPPROPRIATE BECAUSE THE PORTION OF THE SEVENTH CIRCUIT'S OPINION FOR WHICH PETITIONER SEEKS REVIEW IS DICTA

Question I – the Union's assertion that the Seventh Circuit "exceeded its statutory authority by declaring a category of interlocutory orders appealable as a matter of right" – does not warrant this Court's review. A writ of certiorari is clearly unnecessary where the Union is seeking this Court's review of dicta, and a ruling in the Union's favor would not change the outcome of the case.

The Union argues that the Seventh Circuit should not have considered the District Court's May 11, 1998 vacatur Order to be an interlocutory order that could be appealed at the end of the entire litigation. But the portion of the Seventh Circuit's decision about which the Union complains is dicta. The Seventh Circuit's *holding* is that the District Court's May 11, 1998 vacatur Order was immediately appealable pursuant to the Federal

Arbitration Act, 9 U.S.C. § 16(a)(1)(E) (Appendix to Petition at 3a-4a). The Union, however, did not file a notice of appeal regarding the District Court's May 11, 1998 Order until August 19, 1998 – long after the expiration of Fed.R.App. 4's 30-day appeal period. (*Id.*).

Thus, even if this Court were to issue a writ of certiorari and accept the Union's argument, it would do the Union no good. The unalterable fact – which the Union does not challenge – is that, as the Seventh Circuit found, the Union filed an untimely appeal of the District Court's May 11, 1998 Order vacating the first arbitration award. Consequently, the Union waived any right it had to the Seventh Circuit's (and this Court's) review of the District Court's vacation of that award in the Union's favor.

Further, contrary to the Union's contention, the Seventh Circuit did not "create" a "new category of case for which interlocutory appeals may be taken without regard to the provisions of 28 U.S.C. Section 1292." (Petition at 10). Rather, the Seventh Circuit adhered to the fundamental (and unremarkable) principle that at the time the Court of Appeals reviews a final judgment, the parties may appeal all non-moot, non-final orders issued along the way. Moreover, the unique procedural history of this case (two appellate proceedings but only one underlying litigation, *see* Appendix to Petition at 6a) is unlikely to be repeated, given the Seventh Circuit's admonition that arbitral remand orders are immediately appealable under 9 U.S.C. § 16(a)(1)(E). Accordingly, there is no compelling reason for this Court to review any aspect of this case.

II.

THERE IS NO CONFLICT AMONG THE CIRCUITS REQUIRING THIS COURT'S REVIEW

With respect to the Union's Question II, there is no conflict among the Circuits requiring resolution by this Court. Again, the Seventh Circuit's holding was that the District Court's May 11, 1998 Order vacating the first arbitration award and remanding the case to the arbitrator was immediately appealable under 9 U.S.C. § 16(a)(1)(E). (Appendix to Petition at 3a-4a). This is in full accord with the decisions from other Circuits which the Union cites. *See* Petition at 12 (citing *Virgin Islands Housing Authority v. Coastal General Construction*, 27 F.3d 911, 914 (3d Cir. 1994); *Union Pac. R. Co. v. United Transportation Union*, 3 F.3d 255, 258 (8th Cir. 1993); *Forsythe International, S.A. v. Gibbs Oil Co.*, 915 F.2d 1017, 1020 (5th Cir. 1990)). The rest of the Seventh Circuit's procedural discussion (other than to reiterate that the Union never instituted an action to challenge the second arbitration award) was dicta, having no bearing on the outcome of the case.

In this regard, the Union conveniently forgets that it waived any right to appellate review of the District Court's May 11, 1998 vacatur Order by failing to bring a timely appeal. As to the second arbitration award, the Union likewise failed to follow the Federal Rules of Civil Procedure, and the Seventh

Circuit's express direction for obtaining judicial review. Instead of filing a complaint challenging the second award, the Union sought a "Rule 54 order" (the substance of which was never identified by the Union) when there was no case pending before the District Court. Hence, even if this Court were to agree with the Union that the District Court's vacatur Order should not have been deemed "interlocutory," it would not help the Union. The Union did not perfect a timely appeal as to the District Court's original decision, and it did not properly institute an action to vacate the second arbitration award. The Union's actions and inactions make this case ill-suited for review by this Court.

CONCLUSION

For the reasons stated above, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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